United States Court of Appeals

for the Second Circuit

INTERVENOR'S REPLY BRIEF

74-2044

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 74-2044

LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO AND LOCAL 1101, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioners,

-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent,

WELLINGTON G. RIGBY and NEW YORK TELEPHONE COMPANY,

Intervenors.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

INTERVENOR RIGBY'S BRIEF

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ISSUE PRESENTED

Can a labor organization rely upon an agency shop union security provision to justify activity otherwise proscribed under sections 8(a)(3) and 8(b)(2) where a union shop security provision is concerned and demand that an employer discharge an employee for failure to tender an agency fee after the labor organization has denied the employee membership for reasons other than his failure to tender dues and initiation fees uniformly required as a condition of acquiring membership?

STATEMENT OF CASE

Wellington G. Rigby is an individual who has been in the continuous employ of the New York Telephone Company (Telco) since July 6, 1948. During his 26 years of satisfactory service with Telco, Rigby has periodically been a member of labor organizations representing employees of Telco. For the past several years Rigby has been working at Telco's Bellmore facility, within the jurisdiction of Local 1104, Communications Workers of America, AFL-CIO (Local 1104), the exclusive bargaining representative for these employees of the company. On or about May 1969, Rigby became a member of Local 1104 and remained a member in good standing until on or about July 7, 1971, at which time he duly resigned therefrom in accordance with Article 33 of the collective bargaining agreement then in effect between the Communications Workers

and Telco.[1] Rigby's resignation preceded the lengthy strike by the Communications Workers against Telco, which began shortly thereafter and continued into early 1972. Although Rigby had validly withdrawn his union membership, he did not work during the Communications Workers' strike against Telco and returned to work only after the strike had been settled. Upon his return to work following the strike, dissatisfied with the representation given the employees by the Communications Workers, Rigby solicited support for the Teamsters from among members of the bargaining unit represented by Local 1104. He was not a member of any labor organization at this time, and was not required as a condition of continued employment to be a member of any labor

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[1] In this collective bargaining agreement, which is the one immediately preceding the agreement containing the agency shop clause at issue herein, there was a maintenance of union dues provision in article 33, which provided as follows:

> 33.01 Each employee who is a member of the Union:
> (a) on or after the 30th calendar day following the beginning of his employment or
> (b) on or after May 22, 1967, the effective date of this Agreement,
>
> whichever is the latest, shall, as a condition of employment pay or tender to the Union an amount equal to the periodic Union dues until the final termination of this Agreement, except that each such employee may, within the 10-day period immediately preceding the termination date of this Agreement terminate his obligation to tender periodic Union dues to the Union as a condition of employment by notifying both the Union and the Company of his withdrawal from membership in the Union. (Emphasis added.)

organization, and engaged in this activity during the S[illegible] of 1972. After a brief period of activity on behalf of the Teamsters, Rigby ceased all such activity and sought to rejoin Local 1104 and take an active part in union affairs affecting his livelihood. On or about July 26, 1972, after Rigby had stopped organizing for the rival union, he submitted an application for membership in Local 1104. His membership application was denied solely because he had engaged in organizing for a rival of the Communications Workers (JA 10a, 53a-54a, 82a)* even though he was not a member of the Communications Workers or any other labor organization at the time of his solicitation of support for the Teamsters.

In the newly negotiated collective bargaining agreement between Telco and the Communications Workers, which ended the strike, there was, for the first time, an agency shop provision which replaced the previous maintenance of union dues provision.[2]

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* References to the Joint Appendix will be denoted JA___.

[2] Article 33 of the agreement in question provides for an agency shop as follows:

> 33.01 Each regular employee shall, as a condition of employment, pay or tender to the Union amounts equal to the periodic dues applicable to members for the period beginning 30 days after hire or 30 days after February 17, 1972, whichever occurs later, until the termination of this collective bargaining agreement, except that an employee may terminate this condition of employment by giving a written individual notice to the Company and the Union of such termination by certified or registered mail, return receipt requested, and postmarked between July 8, 1974 and July 17, 1974, both dates inclusive.

Notwithstanding Local 1104's denial of union membership to Rigby, the union insisted that Rigby pay the equivalent of union dues under the agency shop provision of the contract. Rigby tendered dues on the condition that he be accepted as a member of Local 1104 and executed a payroll deduction authorization for union membership dues (JA 68a). Refusing to accept dues from Rigby as a member, Local 1104 thereafter requested that Telco terminate his employment for failure to pay an agency fee.

The reason for Local 1104's continued refusal to give Rigby membership rights is the organizing activity which he engaged in for the Teamsters <u>while he was not a member, and not required to be a member</u>, of the Communications Workers or any other labor organization in the Spring of 1972. Rigby has at all times been, and still is, ready, willing, and able to pay all validly required dues and initiation fees upon his acceptance as a member of Local 1104. He has likewise been willing to support Local 1104 as a member with undivided loyalty upon his acceptance as a member, as he did between 1969 and 1971. He meets all of the eligibility requirements for union membership set forth in the Communications Workers' Constitution and the by-laws of Local 1104 (JA 57a, 63a-64a), and has never been tried, fined, suspended or expelled by Local 1104 for any union offenses while a member of that organization.

ARGUMENT

> A union's demand pursuant to an agency shop union security provision that an employer discharge an employee for reasons other than his failure to tender periodic dues and initiation fees uniformly required is violative of §§8(b)(2) and 8(b)(1)(A) of the Act.

An agency shop provision in a collective bargaining agreement gives a labor organization no greater rights under the National Labor Relations Act, as amended, than does a union shop security provision, and, therefore, a union's demand that an employer discharge an employee for reasons other than his failure to tender periodic dues and initiation fees uniformly required is violative of Section 8(b)(2) and 8(b)(1)(A) of the Act. This position has support in the legislative history of the Act as well as Board and court case law.

Section 8(b)(2), 29 USC §158(b)(2), makes it an unfair labor practice for a union

> "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." (Emphasis added.)

Section 8(a)(3), id. §158(a)(3), its counterpart, makes it unlawful for an employer

> "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later... Provided further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization...(B) <u>if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.</u>" (Emphasis added.)

It is well settled that the preceding sections are literally enforced and absolutely proscribe union requests that an employer discharge employees under a union security provision for any reason other than their failure to "tender periodic dues and initiation fees uniformly required as a condition of acquiring membership." It is also settled that the proviso to Section 8(b)(1)(A), <u>id.</u>, §158(b)(1)(A) does not absolve compliance with Sections 8(b)(2) and 8(a)(3).[3]

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[3] Section 8(b)(1)(A) reads as follows:

> "It shall be an unfair labor practice for a labor organization or its agents--
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: <u>Provided</u>, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;"

At the outset, it is significant to note that Congress, in drafting the Taft-Hartley amendments, specifically rejected a proposal that would have given unions the right to insist upon an employee's discharge where he engaged in dual unionism at a time when the Board would not entertain a question concerning representation. S. Rep. No. 105, 80th Cong., 1st Sess., 21, I Legislative History of the Labor Management Relations Act of 1947, at 427; S. 1126, as reported at 14, id. at 112. Consequently, although a union could properly expel a member for such activity, it could not affect his employment status on that ground alone. Rigby, had he engaged in dual unionism, therefore, could not have been dismissed from the union and discharged on that ground alone. A fortiori, as a nonmember of any labor organization engaging in the exercise of the most fundamentally protected rights, Rigby could not be discharged for nonmembership in the union where his application was denied for a reason other than failure to pay dues and initiation fees. Development of the law before the Board and courts to date has fulfilled this congressional objective.

Several years ago, in A. Nabakowski Co., 148 NLRB 876, 57 LRRM 1105 (1964), enf'd, NLRB v. Sheet Metal Workers Int'l Assn'n., Local 65, 359 F. 2d 46, 62 LRRM 2076 (6th Cir. 1966), the Sixth Circuit enforced a Board order in a case wherein the union administered a nondiscriminatory aptitude test which applicants for union membership had to pass as a prerequisite for

acceptance. Employees who failed the test were denied membership and the employer was asked by the union to discharge them. In upholding the union's unrestricted right to establish its own nondiscriminatory rules for the acquisition of membership, the Board nonetheless noted,and the Sixth Circuit affirmed, that the denial of membership for reasons other than failure to tender dues and initiation fees uniformly required precluded the union from insisting that the employer discharge those employees so denied membership. The Board also followed this position in Bricklayers Union No. 4, 160 NLRB 1837, 63 LRRM 1204 (1966). Likewise, in Operating Engineers, Local 12, 164 NLRB 358, 65 LRRM 1309 (1967), enf'd, NLRB v. IUOE, Local 12, 413 F. 2d 705, 71 LRRM 3144 (9th Cir. 1969), the Ninth Circuit affirmed the Board's holding that a union's refusal to grant reinstatement to a former member absolved the employee of compliance with the collective bargaining agreement's union security provision. More recently, the Board found in CWA Local 9509, 193 NLRB 83, 78 LRRM 1190 (1971) that expulsion from union membership relieved an employee of any obligation to pay dues under a union security provision. This decision was based on the Board's decision in Local 4186, United Steel Workers, 181 NLRB 992, 73 LRRM 1570 (1970), wherein the Board found that an employee was even absolved of dues requirements when his membership rights were impaired by denial of the right to attend union meetings or to hold office, but not terminated, for reasons other than his failure to tender dues

uniformly required. As the Board stated in this case,

> the union's insistence upon Blaine's continued payment of dues during periods when his rights as a member were significantly reduced constituted a continuing form of coercion tending to operate as a serious restraint upon access to Board processes. The Union's insistence upon Blaine's payment of dues, on pain of discharge, cannot be considered as disassociated from the suspension of membership rights resulting from his decertification activity. We see no justification, either in the proviso to Section 8(b)(1)(A) or in considerations of a labor organization's need for self preservation, for the steps taken against Blaine. The threat to enforce the union-security clause while continuing the sanctions against Blaine was hardly necessary to preserve the Union's existence as an institution, nor could it be viewed as a noncoercive form of internal discipline which would have no discouraging effect upon a member's decision to invoke the Board's representation procedures.

Id.

The distinction drawn here between permissible, defensive self-protective measures and illegal coercive activity has its foundation in earlier Board and court cases. Repeatedly, it has been held by the Board and the courts that a union violates section 8(b)(1)(A) of the Act when it fines a member for engaging in protected activities concerning the fundamental right to choose to belong or not to belong to a union. NLRB v. International Moulders & Allied Workers Union, 442 F. 2d 92, 77 LRRM 2067 (7th Cir. 1971), enf'g., International Moulders & Allied Workers Union, Local 125, 178 NLRB 208 (1969) (circulating decertification petition); Machinists Lodge 113, 207 NLRB

No. 127, 84 LRRM 1601 (1973)(supporting deauthorization petition); Tri-Rivers Marine Engineers Union, 189 NLRB 838, 77 LRRM 1027 (1971)(soliciting authorization cards for rival union); Printing Specialties & Paper Products Union No. 481, 183 NLRB 1271, 74 LRRM 1698 (1970)(filing representation petition for rival union); United Lodge No. 66, IAMAW, 182 NLRB 849, 74 LRRM 1201 (1970). On the other hand, discipline in the form of suspending or expelling from union membership or activity, or barring from union office have been upheld as permissible measures of self protection. Id.; Price v. NLRB, 373 F. 2d 443, 64 LRRM 2495 (9th Cir. 1967), enf'g United Steelworkers of America, Local 4028, 154 NLRB 692, 60 LRRM 1008 (1965); Tawas Tube Products, Inc., 151 NLRB 46, 58 LRRM 1330 (1965).

The underlying rationale for the distinction in these cases between discipline in the form of a fine as opposed to the imposition of a restriction on union membership or membership activity bespeaks the persistent attempt to balance individual rights against those of an institution sanctioned by national labor policy without destroying either in the process. Therefore, where activities inimical to the continued existence of a labor organization as a bargaining agent in a particular unit have been undertaken by members of that union, the Board and the courts have agreed that a permissible means of self-protection is the suspension, expulsion or removal from office of those members; there is no reason to continue to allow such members

to remain privy to internal union matters. At this point, the interests of the individual and the union have been fairly balanced. The individual has engaged in protected activity, but, as a consequence, has been forced to forfeit his right to take an active part in union activities and shaping the direction of union policy affecting his unit; that is the sacrifice he has to make where the pursuit of protected activities threatens the continued existence of the incumbent union as bargaining agent for the unit. When a union fines individuals, however, for engaging in these same protected activities, then the balance has been tipped very unfavorably to the benefit of the union at the expense of individual rights. Not only will the union have protected itself by keeping hostile dissidents away from internal union activities, but it will have also discouraged these individuals from engaging in protected activities by exacting a penalty from them. Fining alone would, of course, only further this latter objective. In the first instance, the expulsion, suspension, or debarment is a defensive measure of self-protection serving the union's interest of continued existence and efficacy while accommodating the interests of the individuals pursuing protected rights. In the latter instance, the fine is a punitive, offensive measure which can only have the effect of coercing individuals to refrain from engaging in protected activity which threatens the union.

Accepting this rational distinction drawn by the Board and approved by the courts, one is compelled to find proscribed

coercion and illegal insistence on discharge in the case at bar. The denial of union membership to Rigby while simultaneously seeking his discharge for refusal to tender dues is a fortiori coercive. Not only is he being penalized for organizational activities on behalf of a rival by having a voice in union affairs and access to internal union matters denied him, but his job is also being threatened. Obviously, the threat of losing one's job and with it the means to pay a union fine is infinitely more suitable to the union's purposes than even a fine itself would be if it could be levied. It is difficult to conceive of a more coercive dilemma in which the union seeks to place outspoken critics.

Furthermore, and it is difficult to emphasize this enough, there are two additional factors that make Rigby's case even stronger than those previously discussed. Thus far, the discussion has been in the context of Board and court cases wherein union members under union shop security clauses were involved. Rigby's case involves a nonmember under an agency shop security clause, a case of first impression. To be sure, the fact that the activity about which Rigby complains is proscribed under the rationale of union shop cases involving union members a fortiori brings one to the same conclusion where a nonmember is involved under an agency shop provision.

Accepting arguendo the General Counsel's ruling that the denial of union membership to Rigby because of his activities on behalf of a rival is protected under the proviso to 8(b)(1)(A), what could possibly be the ramifications of nonetheless forcing

individuals like Rigby to support the union financially? Considering, for example, a situation where an unrepresented group of employees were being organized by two rival unions, it is easy to see the coercive effect of permitting this kind of activity. No one could seriously contend that the union which won should be permitted to turn around and deny membership to all those who supported the rival union and then force them to provide financial support to the organization in which they have been denied membership.[4] Otherwise, one would have to sanction as permissible union campaign activity a pitch to employees which in effect threatened them with denial of union membership without relief from providing financial support in the event they supported the losing union. The destructive, coercive impact of such activity on unfettered employee freedom of speech and choice is quite obvious.

Now, to carry this example one step further and bring it right into line with the situation in the present case, and to provide another perspective of the problem, assume the campaign

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[4] It is submitted even further that no one would seriously contend that the rival's adherents could even be denied membership for engaging in protected activity; yet the position of the General Counsel in upholding the denial of membership to Rigby for his activities on behalf of a rival supports such a denial of membership. Interestingly enough, the companion case herein held the denial of membership for engaging in protected activity and crossing an illegal picket line to be proscribed by section 8(b)(1)(A) (JA 83a-85a).

was vigorously and hotly contested between the two unions and that the margin of victory for the successful union is very narrow. In the ensuing negotiations, due to the lack of backing from a strong, overwhelming majority, the incumbent is unable to insist upon and secure a union shop security clause requiring union membership of all bargaining unit members as a condition of continued employment. Instead, the best it can do is secure an agency shop security clause requiring bargaining unit members either to become union members and support the union financially and otherwise or to stay nonunion but nonetheless provide financial support. Under the agency shop, the union is in no position other than to await the employee's choice and either accept for membership or insist on payment of an amount equivalent to dues if the individual refuses membership. The option is with the employee to become or not to become a union member. Yet here, the union is attempting to place the option in its hands; it is trying to achieve through this litigation what it was unable to secure at the bargaining table--mandated support from all bargaining unit members.

In this connection, the union has pressed its case in its brief with terminology disigned to evoke the sympathies of this court but which belies the actual case at bar. Thus, the court is asked to sanction the union's treatment of "disloyal" employees. Rigby owed no loyalty to Local 1104 as a nonmember in a situation which did not require membership, and the union's attempt to

manufacture support it does not have by requiring "loyalty" of those from whom they have no right to expect it clearly requires suppression of the exercise of rights guaranteed by the Act.[5] Quite obviously, the union's purpose is to stifle its critics and selectively choose its membership, requiring vocal advocates of change to support the union while denying them union membership and an effective voice in union matters affecting the bargaining unit as a whole. This is clearly an abuse of the agency shop.

In the Supreme Court's decision in NLRB v. General Motors Corp., 373 U.S. 734, 53 LRRM 2313 (1963), upholding the agency shop as a permissible form of union security, the Court specifically noted that it was not sanctioning use of the agency shop in the manner in which the union seeks to use it in this case. Id. at

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5 It is interesting to note, in fact, that Rigby,quite honestly with himself and the union, duly resigned his membership when he felt he could no longer support Local 1104. He did not continue his membership to remain privy to internal matters while secretly supporting a rival. Further, even though not a member, he did not engage in any strike breaking activities, which certainly undermine the union's activities, as did the employees in the companion case.

744 n.12; 53 LRRM at 2317 n.12.[6] Passing upon its validity, the Court noted that

> "[t]he proposal for requiring the payment of dues and fees [under an agency shop provision] imposes no burden not imposed by a permissible union shop contract and compels the performance of only those duties of membership which are enforceable by discharge under a union shop arrangement."

Id. at 743, 53 LRRM at 2316-17. Further, the Court pointed out that the purpose of the agency shop is to allow employees an alternative to compulsory unionism while simultaneously protecting unions from "free riders". As the Court noted in General Motors, "[t]he [agency shop] arrangement proposed here...places the option of membership in the employee while still requiring

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[6] In so doing, the Court did indicate that it was leaving that issue for another case:

> "Also wide of the mark is respondent's further suggestion that Congress contemplated the obligation to pay fees and dues to be imposed only in connection with actual membership in the union, so as to insure the enjoyment of all union benefits and rights by those from whom money is extracted. Congress, it is said had no desire to open the door to compulsory contracts which extract money but exclude the contributing employees from union membership. But, as analyzed by the Board and as the case comes to us, there is no closed-union aspect to the present proposal by the union. Membership remains optional with the employee and the significance of desired, but unavailable, union membership, or the benefits of membership, in terms of permissible §8(a)(3) security contracts, we leave for another case. In view of the legislative history of the Taft-Hartley amendments to §8(a)(3) and of their purposes, we cannot say that optional membership, which is neither compulsory nor unavailable membership, vitiates an otherwise valid union-security arrangement." (Emphasis added.)

the same monetary support as does the union shop." Id. at 744, 53 LRRM at 2317; see Radio Officers' Union v. NLRB, 347 U.S. 17, 40-41, 33 LRRM 2417, 2426 (1954). In the instant case, the union is attempting to place the option in its hands; and, not to protect itself from "free riders", but rather to stifle opposition from nonunion members of the bargaining unit. It is attempting to convert the shield provided by Congress for self protection into a sword to eliminate vocal opposition that is willing to pay the freight, while contesting union policies and practices. To allow a union to convert what is generally recognized as a situation less desirable than a union shop, resulting from a weak bargaining position, into a club that will enable it selectively to choose its membership and force its critics denied membership to subsidize its existence is contrary to common sense and the mandate of the statute.

CONCLUSION

As the nation approaches its bicentennial, it is indeed surprising to find a spokesman of the working man advocating taxation without representation. Taxation without representation where the choice not to be represented is the employee's own is one thing; but, taxation without representation in union affairs where the opportunity to be represented is denied by the union is quite another. There is not one iota of justification in the legislative history or the case law of sections 8(b)(1)(A),

8(b)(2) and 8(a)(3) for the ends sought by Local 1104. Unless this Court is prepared to strip American citizens of fundamental democratic rights once they enter the workplace and foster truly coercive union activity, the Board's order must be enforced in its entirety.

Dated: November 21, 1974.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NASSAU) ss.:

DENISE HAMBER, being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at 514 Kingston Avenue, East Meadow, N.Y. That on the 25th day of November, 1974, deponent served the within Brief upon the following at the addresses listed below:

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by depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within New York State.

Denise Hamber

Sworn to before me this
25th day of November, 1974.

Bernice Kamen

BERNICE KAMEN
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-7415800
Qualified in Nassau County
Commission Expires March 30, 1976